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No. 81-110

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE E. TOPPING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioners are four crewmen of a commercial fishing vessel whose compensation was based upon their vessel's profits (Pet. App. A1). Crab pots belonging to the vessel were destroyed as a result of allegedly negligent naval operations by a government submarine and submarine tender (*ibid.*). Petitioners then brought this action against the United States to recover for their loss of income from anticipated catches of crabs (*ibid.*).

The United States District Court for the Eastern District of Virginia granted summary judgment for the government (Pet. App. A1-A3), applying the general rule of *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 309 (1927), that "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." The court of appeals affirmed on that ground (Pet. App. B1-B2).

2. The courts below correctly applied this Court's decision in *Robins Dry Dock*, and reconsideration of the issue decided in that case is not warranted. Furthermore, as petitioners concede (Pet. 17), cases like the present one are rare, and no important federal question is involved.

Petitioners' principal argument is that the decision below conflicts with *Carbone* v. *Ursich*, 209 F. 2d 178 (9th Cir. 1953). In *Carbone*, the Ninth Circuit permitted crew members whose compensation was based upon their boat's profits to recover from another vessel responsible for damaging their vessel's fishing net and causing the loss of its catch. The court created an exception to the *Robins Dry Dock* rule based upon "the special situation of the fishermen" and derived from "the familiar principle that seamen are the favorites of admiralty and their economic interests are entitled to the fullest possible legal protection." *Id.* at 182. In the 28 years since it was decided, *Carbone* has not been followed by any other court and has generally been regarded as an anomaly. See, *e.g.*, *Guarrasi* v. *Panal Canal Co.*, 271 F. Supp. 678, 680 (D.C.Z. 1967); *Henderson* v. *Arundel Corp.*, 262 F. Supp. 152, 159-160 (D. Md. 1966), aff'd, 384 F. 2d 998 (4th Cir. 1967); *Casado* v. *Schooner Pilgrim, Inc.*, 171 F. Supp. 78, 80 (D. Mass. 1959). Accordingly, there is no reason for this Court to review the correctness of that decision.

Petitioners maintain (Pet. 8-17) that other decisions of the court of appeals have called into question the holding of *Robins Dry Dock*. However, none of those cases casts serious doubt upon the validity of the *Robins Dry Dock* rule, and none conflicts with the decision below.

In *In re Kinsman Transit Co.*, 388 F. 2d 821 (2d Cir. 1968), upon which petitioners rely (Pet. 8-10), the owners and operators of a vessel negligently allowed it to break loose from its moorings. The vessel drifted downstream and

struck a bridge, thereby creating an obstruction to navigation and causing financial loss to the plaintiffs, two firms that stored and transported grain on the river. The court of appeals held that the plaintiffs' losses were too remote from the negligent act to allow recovery (388 F. 2d at 824-825). While expressing reservations about the doctrine barring recovery for negligent interference with contract rights, the court did not reach that question (*id.* at 823-824). However, in a subsequent case, *Federal Commerce & Navigation Co.* v. *M/V Marathonian*, 528 F. 2d 907 (2d Cir. 1975), cert. denied, 425 U.S. 975 (1976), the same court denied recovery under the *Robins Dry Dock* rule, stating that there were arguments both in favor of and against the rule but that it could discern no retreat from the rule by this Court (528 F. 2d at 908).

Petitioners also rely (Pet. 10-12) upon *Union Oil Co.* v. *Oppen*, 501 F. 2d 558 (9th Cir. 1974), in which commercial fishermen were permitted to recover from an oil company responsible for an oil spill that damaged aquatic life. In that case, however, the court referred to *Robins Dry Dock* in passing (501 F. 2d at 564), but based its decision upon a special duty owed by those responsible for oil spills (*id.* at 569).

The remaining cases cited by petitioners are wholly inapposite. In *Marine Navigation Sulphur Carriers, Inc.* v. *Lone Star Industries, Inc.*, 638 F. 2d 700 (4th Cir. 1981) (see Pet. 16-17), the court relied upon the portion of the opinion in *In re Kinsman Transit Co.*, *supra*, concerning proximate cause, but the court did not adopt the dicta in that opinion concerning *Robins Dry Dock*. And in *Venore Transportation Co.* v. *M/V Struma*, 583 F. 2d 708 (4th Cir. 1978) (see Pet. 14-16), the rule of *Robins Dry Dock* was held to be inapplicable to a factual situation not presented here. Any

alleged inconsistency between that decision and the present one by the same court is, of course, for that court to resolve.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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